

08 AUG 18 2008
NORTHERN DISTRICT OF CALIFORNIA
U.S. DISTRICT COURT
FILED
3:57

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name **DAVIS** **FRANCIS** **W.**
 (Last) (First) (Initial)

Prisoner Number **K-80609**

Institutional Address **CSATF State Prison, P.O. Box 5242,
Corcoran, Ca. 93212 -5242**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Francis Wayne Davis

(Enter the full name of plaintiff in this action.)

vs.

Warden Ken Clark

(Enter the full name of respondent(s) or jailor in this action)

CV

08

3933

Case No.

(To be provided by the clerk of court)

**PETITION FOR A WRIT
OF HABEAS CORPUS (PR)**

E-filing

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

008-3933-JW

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Santa Clara County Superior Court, San Jose

| Court | Location |
|-------|----------|
|-------|----------|

(b) Case number, if known 193679

(c) Date and terms of sentence Sentenced 01-08-98 to 21 years.

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes No

Where?

Name of Institution: CSATF State Prison, P.O. Box 5242,

Address: Corcoran, Ca. 93212 - 5242

2. For what crime were you given this sentence? (If your petition challenges a sentence for

more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

P.C. # 220

P.C. § 245 (A)(1)

P.C. # 245 (A)(1)

1 3. Did you have any of the following?

2 Arraignment: Yes No _____

3 Preliminary Hearing: Yes No _____

4 Motion to Suppress: Don't Remember, Yes _____ No _____

5 4. How did you plead?

6 Guilty _____ Not Guilty Nolo Contendere _____

7 Any other plea (specify) _____

8 5. If you went to trial, what kind of trial did you have?

9 Jury Judge alone _____ Judge alone on a transcript _____

10 6. Did you testify at your trial? Yes No _____

11 7. Did you have an attorney at the following proceedings:

12 (a) Arraignment Yes No _____

13 (b) Preliminary hearing Yes No _____

14 (c) Time of plea Yes _____ No _____

15 (d) Trial Yes No _____

16 (e) Sentencing Yes No _____

17 (f) Appeal Yes No _____

18 (g) Other post-conviction proceeding Yes _____ No

19 8. Did you appeal your conviction? Yes No _____

20 (a) If you did, to what court(s) did you appeal?

21 Court of Appeal Yes No _____

22 Year: _____ Result: Denied... Case No. SC 87417

23 Supreme Court of California Yes No _____

24 Year: _____ Result: Denied

25 Any other court Yes No _____

26 Year: _____ Result: U.S.D.C. - Denied.

27 (b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes _____ No

2 (c) Was there an opinion? Don't Know. Yes _____ No _____

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes _____ No

5 If you did, give the name of the court and the result:

6 _____
7 _____

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to
9 this conviction in any court, state or federal? Yes No _____

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit
13 for an order authorizing the district court to consider this petition. You may not file a second or
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: Santa Clara Superior Court, San Jose, CA.

19 Type of Proceeding: Writ of Habeas Corpus

20 Grounds raised (Be brief but specific):

21 a. Sentencing Errors

22 b. _____

23 c. _____

24 d. _____

25 Result: Denied Date of Result: 03-01-07

26 II. Name of Court: Court of Appeal 6th Dist. of California.

27 Type of Proceeding: Writ of Habeas Corpus

28 Grounds raised (Be brief but specific):

1 a. Sentencing Errors
2 b.
3 c.
4 d.

5 Result: Denied Date of Result: 04-25-07

6 III. Name of Court: Supreme Court of California

7 Type of Proceeding: Writ of Habeas Corpus

8 Grounds raised (Be brief but specific):

9 a. Sentencing Errors
10 b.
11 c.
12 d.

13 Result: Denied Date of Result: 09-19-07

14 IV. Name of Court: _____

15 Type of Proceeding: _____

16 Grounds raised (Be brief but specific):

17 a.
18 b.
19 c.
20 d.

21 Result: _____ Date of Result: _____

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes _____ No ✓

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
27 support each claim. For example, what legal right or privilege were you denied? What happened?
28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: Plaintiff's Sixth Amendment Right to Trial by Jury
6 was impaired, unfair, and violated by Judge Hastings.

7 Supporting Facts: Plaintiff was sentenced to the aggravated -
8 high term in error... prejudicial error.

9 Claim One's supporting facts continued on page
10 eight. Page 8 - 21.

11 Claim Two: Plaintiff's Fourteenth Amendment Right was
12 violated by the imposed sentence by Judge Hastings.

13 Supporting Facts: Court used same prior to enhance and
14 double petitioner's sentence... dual use of a
15 prior. Claim Two's supporting facts continued on
16 page eight also. Page 8 - 21.

17 Claim Three: Plaintiff's Fifth Amendment Right was violated
18 by the sentence imposed by Judge Hastings.

19 Supporting Facts: The court violated the "Fifth Amendment
20 Double Jeopardy Clause." Petitioner was forced to face
21 two tribunals concerning Aggravating Factor (GBI).
22 Claim three's supporting facts continued on page eight also.
23 Page 8 - 21!!

24 If any of these grounds was not previously presented to any other court, state briefly which
25 grounds were not presented and why:

26 _____
27 _____
28 _____

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 _____
5 _____
6 _____

7 Do you have an attorney for this petition? Yes _____ No

8 If you do, give the name and address of your attorney:
9 _____

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12 Executed on 08-12-08

13 Date

Francis W. Davis

14 Signature of Petitioner

15 (Rev. 6/02)

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Page 8.

Claim One Supporting Facts

Petitioner was convicted of P.C. § 245(A)(1), and P.C. § 220 against Victim #1. Petitioner was also convicted of P.C. § 245(A)(1) against Victim #2.

The court heard the allegations of prior convictions, not the jury, and found allegation of prior conviction true. The jury ruled on the "Aggravating Factors," which was an allegation of Great Bodily Injury (GBI). The jury found the aggravating factor "NOT TRUE." At sentencing the court found GBI true.

P.C. § 245(A)(1) is punishable by 2, 3, or 4 years in state prison; P.C. § 220 is punishable by 2, 4, or 6 years in state prison.

Petitioner should have been sentenced to the mid-term of 4 years, not the high-term of 6 years and then the appropriate enhancement should have been added. Plaintiff should have been sentenced to 15 years, not 21 years.

A. Cunningham overrules Black and compels a reversal.

The U.S. Supreme Court's opinion in Cunningham v. California (No. 05-6551, Jan. 22, 2007) 549 U.S. — [2007 U.S. LEXIS 1324]) overruled People v. Black (2005) 35 Cal. 4th 1238. • Cunningham is a straightforward application of Blakely v. Washington (2004) 542 U.S. 296, and the "bright-line rule" of Apprendi v. New Jersey (2000) 530 U.S. 466 "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt.'" In this case the jury found the alleged aggravating facts "not true." (Cunningham, — U.S. at p. — [2007 U.S. Lexis 1324, pp. 35-36], emphasis added.)

While Cunningham did not address the full term consecutive

sentences under Penal Code § 667.6, subdivision (c), it's logic requires a reversal of the effects of a judge-made finding which increases the sentence. Cunningham analyzed the assumptions in Black, and found that each violated Apprendi's "bright-line rule." (Cunningham, at p. — [2007 U.S. Lexis 1324, at pp. 39-40].) Black misunderstood prior U.S. Supreme Court precedent in its erroneous belief that there was no "bright-line rule" on the issue. (Cunningham, at p. — [2007 U.S. Lexis 1324, at p. 40].) The Black decision is no longer binding authority.

Accordingly, Cunningham held that the Sixth and Fourteenth Amendment requirements of a jury trial and proof beyond a reasonable doubt for upper term aggravating factors, other than prior convictions, apply directly to California's sentencing laws, in exactly the same manner that they applied to the Washington sentencing scheme which the U.S. Supreme Court invalidated in Blakely, and to the mandatory federal Guidelines invalidated in Booker. (Cunningham, — U.S. at p. — [2007 U.S. Lexis 1324, at pp. 11, 24, 35-37, 39-44].) Petitioner was accorded these federal constitutional guarantees and then they were prejudicially taken away by Judge Hastings. Please see exhibits "A, B, C, and D attached!"

In Blakely v. Washington (2004) 524 U.S. 296, [159 L.Ed.2d 403, 413-414], the Supreme Court held that the trial court's use of an aggravating factor, not found to be true by the jury to increase the defendant's sentence above the statutory maximum, violated the rule explained in Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. It held that a defendant is entitled to a jury determination of any fact that exposes a defendant to greater punishment than the "maximum" otherwise

allowable for the underlying offense.

In the instant case based on the Fifth Amendment Double Jeopardy Clause, petitioner was forced to be tried on the aggravating factors by two separate tribunals. First the jury made a ruling of "NOT TRUE", and then judge Hastings found allegations of GBI to be true. For a court to conduct this second trial completed by a particular tribunal, is a plain violation of petitioner's "valued right to not be placed twice in jeopardy for the same offense." The Fifth Amendment stands in the way of said prejudicial ruling by Judge Hastings.

Furthermore, jeopardy from petitioner's trial terminated when the trial court discharged the jury. (Green v. United States (1957) 355 U.S. 184, 191; People v. Superior Court (Marks) (1991) 1 Cal. 4th 56, 75-76.) Once jeopardy terminated on the greater element of upper-term aggravating factors or section 667.6 factors, the trial court has no legal authority to conduct any further proceedings on that issue, let alone impose a criminal sentence as if further proceedings had been conducted and petitioner lost.

Violations of fundamental rights can be challenged on habeas corpus if a petitioner can show that certain defects so affected the regularity of the trial and conviction "so as to violate the fundamental aspects of fairness and results in a miscarriage of justice." In re Harris, (1993) 5 Cal. 4th 813 [21 Cal. Rptr. 2d 373]. Procedural rights may be considered as fundamental that their violations may be grounds for the issuance of a writ, include denial or impairment of the right to a jury trial. In re Anderson, (1968) 69 Cal. 2d 613 (73 Cal. Rptr. 2d).

1. Convictions and sentences that are imposed, but which are in
 2. excess of the court's jurisdiction or authority can be reversed
 3. through vehicle of habeas corpus where a petitioner demonstrates
 4. that a court acted outside of it's legal authority whether or not
 5. there has been a delay or prior affirmance of the sentence on direct
 6. appeal. *In re Birdwell*, (1996) 50 Cal. App. 4th 926 (58 Cal. Rptr.
 7. 2d 249); *In re Hoddinott*, (1996) 12 Cal. 4th 992 (50 Cal. Rptr.
 8. 2d 706). Sentences found to be in excess of a court's authority
 9. include unconstitutional sentences. *In re Rodriguez*, (1975) 14
 10. Cal. 3d 639 (122 Cal. Rptr. 552).

11. If a court refuses to correct an illegal sentence, a defendant
 12. or any other adversely affected party remain at liberty to petition
 13. an appellate court for a writ of mandate. See *People v. Superior Court*
 14. (*Oliver*), 135 Cal. App. 562 (27 P.2d 670). Alternatively, a petitioner
 15. or defendant may file a habeas corpus. *In re May* *supra*. A
 16. sentence that is not authorized by law or that is based on an
 17. unconstitutional order can be appealed and/or challenged at any time.
 18. *People v. Superior Court (Duram)*, (1978) 84 Cal. App. 3d 480 (148
 19. Cal. Rptr. 698); and *People v. Ventura*, (1978) 84 Cal. App. 3d
 20. Supp. 8 (148 Cal. Rptr. 581).

21. Under *Tegner v. Lane*, 489 U.S. 288, 301 (1989) (Plurality
 22. opinion), habeas corpus relief is generally not available if granting
 23. relief would require the announcement or application of a new
 24. constitutional rule of criminal procedure or a rule that would
 25. break new ground or impose a new obligation on the state or
 26. the federal government. A case announces a new rule if the
 27. result was not dictated by precedent existing at the time the
 28. petitioner's sentence became final. See *Butler v. McKellar*, 494

1. U.S. 407, 415 (1990).

2. A new rule will not be applied retroactively on habeas
 3. corpus review of convictions that have become "final" before the
 4. new rule was announced unless the new rule falls under one
 5. of two exceptions:

6. Exception No. (1.) It places certain kinds of
 7. individual conduct beyond the power of the criminal law -
 8. making authority to proscribe.

9. Exception No. (2.) It is a "watershed rule
 10. of criminal procedure" implicating the fundamental fairness and
 11. accuracy of the proceeding.

12. In the instant case Judge Hastings' sentencing petitioner
 13. to the high-term in a second tribunal was unfair and the
 14. proceeding was flawed by his prejudicial actions. Exception
 15. No. (2.) under Teague v. Lane is satisfied and/or met to
 16. gain relief for petitioner, and petitioner is no longer barred
 17. from relief because his direct appeal was in fact over
 18. in 1999, before the Apprendi Court ruling. The Fifth
 19. Amendment rescues petitioner from the double jeopardy re-
 20. lling handed down by Judge Hastings.

21. Once a decision is made, it becomes the "law of the case,"
 22. and absent clear error or changed circumstances should not
 23. be changed. United States v. Estrada-Lucas, 651 F.2d 1261,
 24. 1263-1264 (9th Cir. 1980). The law of the case doctrine
 25. provides that a court is generally precluded from reconsidering
 26. an issue that has already been decided by the same court, or a
 27. higher court in an identical case. United States v. Cuddy, 147
 28. F.3d 874, 876 (9th Cir. 1997) (internal quotation and citation

1. omitted).

2. Given the U.S.S.C.'s Cunningham enunciation, in the
 3. instant case the Superior Court abused it's discretion in im-
 4. posing the upper term sentence even though the "claimed aggre-
 5. rating factors" was found "NOT TRUE" by the impaneled jury.
 6. That was an unfair and prejudicial ruling by the court. The
 7. way P.C. § 654 was disregarded by the court was also unfair
 8. and prejudicial.

9. The "watershed" rule of criminal procedure implicating the
 10. fundamental fairness and accuracy of the proceeding gives the
 11. instant case hope, because the sentencing to the high-term
 12. violated fundamental rights, impaired petitioner's right to have
 13. his trial completed by a particular tribunal. (Oregon v. Kennedy
 14. (1982) 456 U.S. 667, 671-672 [emphasis added]; Crist v. Bretz
 15. (1978) 437 U.S. 28, 35-36; People v. Marshall (1996) 13
 16. Cal. 4th 799, 824-825.) This constitutional interest "lies
 17. in the need to protect the interest of an accused in retaining
 18. a chosen jury," and has "roots deep in the historic develop-
 19. ment of trial by jury in the Anglo-American system of
 20. criminal justice." (Bretz, at pp. 35-36.)

21. The sentence was imposed in excess of the court's juris-
 22. diction and authority, this court is vested with the authority to
 23. rectify and correct said errors. Cunningham, citing Booker, id at
 24. 543 U.S. 265; Birdwell, Hoddinott *supra*.

25. **B.** The remedy is a midterm sentence for the base term ac-
 26. companied by subordinate terms under section 1170.1 unless there
 27. was a jury finding to support the greater sentencing scheme of
 28. (13.)

1. 667.6

2. Penal Code section 667.6, subdivision (c) is a discretionary sen-
 3. tencing choice. It is "an additional sentencing choice which re-
 4. quires a statement of reasons separate from those justifying the
 5. decision merely to sentence consecutively." Based on California Supreme
 6. Court and other California authority directly on point, and indepen-
 7. dently based on the Fifth Amendment Double Jeopardy Clause on
 8. two separate grounds, imposition of any sentence above the middle
 9. term is not legally permitted and sentencing should be conducted
 10. pursuant to section 1170.1 barring any jury finding to invoke sen-
 11. tencing under section 667.6 subdivision (c). Accordingly, this
 12. court should reduce the upper-term base sentence to the midterm
 13. and any subordinate term should be imposed under section 1170.1.
 14. (Penal Code section 1260; People v. Schueren (1973) 10 Cal. 3d 553,
 15. 561-562.)

16.

17. I. Fifth Amendment Double Jeopardy Clause

18. On at least two separate grounds, the same result is ob-
 19. tained under the Fifth Amendment Double Jeopardy Clause, which
 20. applies here as an adjunct to the Sixth and Fourteenth Amendment
 21. guarantees that were violated.

22. A. Applicability of the Federal Double Jeopardy Clause

23. Petitioner reiterates "Apprendi's bright-line rule" which
 24. Cunningham held was violated in cases such as this one: "[U]nder
 25. the Due Process Clause of the [Fourteenth] Amendment and the no-
 26. trial and jury trial guarantees of the Sixth Amendment, any fact
 27. that increases the maximum penalty for a crime must be charged
 28. in an indictment [or information], submitted to a jury, or proved

1. beyond a reasonable doubt. In this case the "aggravating factor"
 2. was charged in the indictment and submitted to the jury, but the
 3. jury did not find the aggravating factor true beyond a reasonable
 4. doubt. The jury was dismissed by the court, however at sentencing
 5. the court re-heard the allegation of Great Bodily Injury, found it
 6. to be true ... the second time around. Petitioner was twice
 7. placed in jeopardy for the same "GBI Allegation."

8. Irrespective of what penalty provision might be labeled as
 9. a matter of state law, it is subject to the Fifth Amendment
 10. Double Jeopardy Clause to the same extent that it is subject to
 11. the Sixth and Fourteenth Amendments, including under Appendix.
 12. (People v. Seel (2004) 34 Cal. 4th 535, 545, 548-550 [relying
 13. on United States v. Burke (1978) 437 U.S. 1, 16].) "For purposes
 14. of the [federal double jeopardy] issue here, the precise distinction
 15. between a sentence enhancement and a penalty provision is not
 16. important. The critical feature is ... "an allegation of a circum-
 17. stance that justifies an increased sentence." (Seel, at p. 547 [ci-
 18. tations omitted].)

19. B. First Double Jeopardy Ground: Prohibition against multiple 20. trials.

21. If a defendant is convicted of a lesser offense and the jury
 22. is discharged, the defendant cannot subsequently be charged with and
 23. tried for a greater offense that includes the lesser offense, because
 24. the lesser included offense is the same as the greater offense for
 25. double jeopardy purposes. (Brown v. Ohio (1977) 432 U.S. 161,
 26. 166.) This is an aspect of the well-known "Blockburger rule."
 27. (Blockburger v. United States (1932) 284 U.S. 299, 304.)

28. Here, the federal Double Jeopardy Clause was violated in

1. exactly this manner, the prosecution got a "do-over" first the
 2. aggravating upper-term factors were ruled on by the jury, the out-
 3. come was not what the prosecution wanted, so at sentencing
 4. he had the court to reheat the aggravating upper-term factors,
 5. and petitioner was sentenced to the upper-term illegally.

6. After a conviction or acquittal before a jury, a second prosecu-
 7. tion on a greater including offense violates the Fifth Amend-
 8. ment. (Brown v. Ohio, supra, 432 U.S. at pp. 166-168; Penal
 9. Code section 1023; People v. Lohbauer (1981) 29 Cal. 3d 364,
 10. 372.)

11. Furthermore, jeopardy from petitioner's trial terminated when
 12. the trial court discharged the original jury. (Green v. United States
 13. (1957) 355 U.S. 184, 191; People v. Superior Court (Marks) (1991)
 14. 1 Cal. 4th 56, 75-76.) Once jeopardy terminated on the greater
 15. element of upper-term aggravating factors or section 667.6 fac-
 16. tors, the trial court has no legal authority to conduct any
 17. further proceedings on that issue, let alone impose the upper-
 18. term sentence as if the jury had not already ruled on the aggra-
 19. vating upper-term factors and found them "NOT TRUE."

20. Everyone would agree that if a defendant was acquitted on a
 21. charge, it terminated jeopardy as to that charge. It would violate
 22. the federal Double Jeopardy Clause if the trial court imposed sen-
 23. tence on that charge anyway. (Ex Parte Lange (1874) 85 U.S. (18
 24. Wall.) 163, 173.) The trial court's imposition of upper-term sen-
 25. tences and consecutive sentences in violation of Blakely and
 26. Apprendi is no different here. On this basis alone, the Fifth
 27. Amendment prohibits it.

1. C. Second Double Jeopardy Ground: A Valued Right To
 2. Have Trial Completed Before A Particular Tribunal

3. Separate from the above, there is also a second reason
 4. why the prosecution should not be allowed a second "aggrevat-
 5. ing factor trial," it would constitute federal double jeopardy.

6. "The Double Jeopardy Clause of the Fifth Amendment protects
 7. a criminal defendant from repeated prosecutions for the same offense.
 8. As a part of this protection against multiple prosecutions, the Double
 9. Jeopardy Clause affords a criminal defendant a valued right to have his
 10. trial completed by a particular tribunal." (*Oregon v. Kennedy* (1982)
 11. 456 U.S. 667, 671-672 [emphasis added]; *Crist v. Bretz* (1978) 437
 12. U.S. 28, 35-36; *People v. Marshall* (1996) 13 Cal. 4th 799, 824-
 13. 825.) This constitutional interest "lies in the need to protect the
 14. interest of an accused in retaining a chosen jury," and has "roots
 15. deep in the historic development of trial by jury in the Anglo -
 16. American system of criminal justice." (*Bretz*, at pp. 35-36.)

17. In the instant case the trial court discharged petitioner's
 18. jury after they found the aggravating factor of GB I not true
 19. for purposes of giving petitioner a high term sentence.

20. Now at sentencing, long after petitioner's "first tribunal" (the
 21. jury) was discharged, the question is whether the State can
 22. convene a "second tribunal" (the judge) to try petitioner on the
 23. aggravating factor of GB I again.

24. For a court to conduct a second hearing on the "aggravating
 25. factor" was a plain violation of petitioner's "valued right to have
 26. his trial completed by a particular tribunal," and the interests
 27. emanating from it, under the Fifth Amendment Double
 28. Jeopardy Clause. (*Oregon v. Kennedy*, *supra*; *Crist v. Bretz*, *supra*.)

1. The Fifth Amendment stands in the way.

2. C. Recidivism does not render the error in imposing the
 3. upper base term or imposing full, consecutive sentences under
 4. section 667.6 harmless.

5. Here, none of the factors used by the trial court pass muster
 6. under Cunningham. The mere fact of prior convictions is
 7. not an aggravating factor under rule 4.421 unless they are
 8. numerous or of increasing seriousness. (Rule 4.421(b)(2)).
 9. The court's use of petitioner's criminal history and state prison
 10. prior here were based on qualitative, subjective conclusions which
 11. are the type of judgement calls that Cunningham, Blakely, and
 12. Apprendi reserve for the jury.

13. In addition, the court cited a number of factors in support of imposing the upper term. The mere fact of one prison
 14. prior and reference to criminal history of parole violations were
 15. no serious offense was committed . . . being out of the state of
 16. Texas without consent from parole officer and/or being drunk
 17. in public were the last factors mentioned by the court. They
 18. are also factors which were used to impose enhancements and
 19. double sentence so that they were used to maximum effect and
 20. in violation of rules against the dual use of facts. It is otherwise
 21. impossible to determine on the record before this court
 22. which factors weighed the heaviest in the court's determination
 23. that the upper term was appropriate for petitioner. Thus, because
 24. the sentencing factors used in petitioner's case do not pass constitutional muster under the principles followed in Cunningham,
 25. the court erred in imposing the upper term.

1. D. Petitioner's List of Exhibits and Their Value.

2. 1) Exhibit "A", Court Reporter Transcript, page 13, lines 14-
 3. 23. Proves two points... 1) The aggravating factor was found
 4. "not true" by the jury (petitioner's chosen tribunal).

5. 2) The prosecution requested that the
 6. court try the petitioner a second time as to the aggravating
 7. factor, ("GBI") which was charged in the indictment. The
 8. judge was the prosecutor's "chosen tribunal;" the prosecution
 9. does not have a right to a "second or first tribunal" he most
 10. definitely does not have a right to a "Do Over".

11. 3) Exhibit "B", Court Reporter Transcript, page 18, lines
 12. 13-20. Proves that the court assigned itself as a second tribunal
 13. and imposed the aggravated term as to count four. The court's
 14. first sentence is a description of "Great Bodily Injury." The
 15. court did not depend solely on other factors not already
 16. heard by the jury. This was a cold and calculated act by
 17. the Executive and Judicial Branch of Government that they
 18. knew was illegal.

20. 4) Exhibit "C", Court Reporter Transcript, page 19, lines 14-
 21. 22. Shows how the court prejudicially ignores Penal Code §
 22. 654 and ran the 2 year sentence for PC § 245 (A)(1) con-
 23.secutive with the PC § 228 sentence. It is impossible
 24. for the counts to be separated. State court was suppose
 25. to have the final say on this issue, but now the issue
 26. entails a "double jeopardy violation," and that gives this
 27. court the right to correct the prejudice error.

4.) Exhibit "D", Court Reporter Transcript, page 20, lines
6-11. Proves "dual use of a prior conviction"; after reading
lines 6-11 of exhibit "D" please return to exhibit "B"
lines 6-12, its plain to surmise, see that the court used
the same prior conviction to enhance and double petitioner's
sentence. That renders the sentence illegal.

5.) Exhibit "E," Denial from Superior Court of
California, Santa Clara County.

6.) Exhibit "F," Denial from Court of Appeal of the
State of California, Sixth Appellate District.

7.) Exhibit "G," Denial from the Supreme Court of
California.

Conclusion

The "bright-line rule" of Cunningham, Blakeley and
Apprendi was at first respected by the court and prosecution,
but when petitioner's valued chosen tribunal (the jury) did
not find the charged aggravating factor of GBI to be
true, the court and the prosecutor conducted a "do over" at
sentencing. The court assigned itself as a second tribunal,
chosen by the prosecutor for prejudicial reasons. To illegally
enhance and double petitioner's sentence.

Petitioner's "direct appeal" was in fact final before Apprendi,
however the fundamental fairness and accuracy of the pro-
ceedings were "greatly tarnished" by double jeopardy and

1. dual use of a prior conviction. Through these actions by the
2. Executive and judicial Branches of Government petitioner is
3. a prime candidate for "Exception #2 of Teague v. Lane.
4. These two government officials willingly and knowingly viol-
5. ated the "Fifth Amendment Double Jeopardy Clause," and
6. improper, harsh, and unfair proceedings were carried out at
7. petitioner's sentencing.

8. For reasons stated throughout this petition, petitioner
9. "PRAYS" that this court:

10. 1.) Declare the rights of the parties.
11. 2.) Vacate the underlying sentence
12. and resentence him to 15 years, minus the erroneous 6
13. years that was imposed upon him.
14. 3.) Grant any other relief this
15. court deems appropriate.

16. I declare under penalty of perjury that the fore-
17. going is true and correct.

18. Dated: 08-12-08

19. Sincerely,
20. Francis W. Davis

21. 21.

Exhibit "A"

13

1 MR. MORENO: THANK YOU, YOUR HONOR.

2 INITIALLY, AS TO DEFENDANT'S ARGUMENTS RELATED
3 TO ROMERO, THAT WOULD BE SOMETHING THAT SHOULD HAVE BEEN
4 NOTICED, I BELIEVE, TO THE PEOPLE THAT THERE WAS GOING TO
5 BE SUCH A MOTION. THAT WAS NOT DONE.

6 BUT, HOWEVER, I THINK THE FACTS ARE CLEAR, THE
7 COURT KNOWS OF THE DEFENDANT'S CRIMINAL HISTORY SINCE THE
8 ROBBERY THAT OCCURRED WHEN HE WAS 18 YEARS OLD. THAT HE'S
9 HAD NUMEROUS VIOLATIONS SINCE THEN. HE'S BEEN IN AND OUT
10 OF CUSTODY ON PAROLE FOR NUMEROUS OFFENSES THROUGHOUT THE
11 COUNTRY. AND I'D ASK, BASED ON THE CONDUCT IN THIS CASE
12 AND HIS CRIMINAL HISTORY, THE COURT DENY THAT ROMERO
13 REQUEST.

14 I WOULD RESPOND TO THE AGGRAVATING VERSUS
15 MITIGATING FACTORS. THERE IS NO QUESTION BUT THAT THE
16 VICTIM IN THIS CASE, ANGELA, WAS PARTICULARLY VULNERABLE.
17 SHE WAS ON CRUTCHES AT THE TIME. SHE WAS UNABLE TO FLEE
18 BASED ON HER INJURY, AND THAT THE DEFENDANT DID, IN FACT,
19 USE A GREAT DEAL OF VIOLENCE. AND, ALBEIT, THERE WAS A
20 CHARGE FOR OR THERE WAS A REQUEST AN ALLEGATION OF GREAT
21 BODILY INJURY THAT WAS NOT FOUND TO BE TRUE, I BELIEVE THE
22 COURT CAN STILL CONSIDER THE NATURE OF THE VIOLENCE AS IT
23 WAS PERPETRATED ON BOTH VICTIMS.

24 THE 654 ISSUE, WHICH I THINK IS SOMETHING THAT
25 NEEDS TO BE ADDRESSED, THAT THE PROBATION OFFICER
26 SPECIFICALLY INDICATED THAT HE FELT THAT THE 245 AS TO
27 SANDRA WAS 654 TO THE 220, WHICH IS THE ASSAULT, THE
28 INTENT TO COMMIT RAPE. AND I WOULD DIFFER WITH THAT FOR

Exhibit "B"

18

1 AGAIN, THE FIRST TIME I EVER SAW HER WAS WHEN SHE WALKED
2 THROUGH THAT DOOR. THAT'S ALL I GOT TO SAY.

3 THE COURT: MR. DAVIS, YOUR APPLICATION FOR
4 PROBATION IS DENIED. YOU ARE STATUTORILY INELIGIBLE FOR A
5 GRANT OF PROBATION.

6 AS TO COUNT FOUR OF THE INFORMATION, FOR A
7 CONVICTION OF CALIFORNIA PENAL CODE SECTION 220, YOU ARE
8 ORDERED COMMITTED TO THE CALIFORNIA DEPARTMENT OF
9 CORRECTIONS FOR THE TERM OF 12 YEARS. THAT'S DOUBLE THE
10 TERM, WHICH IS THE AGGRAVATED TERM, BECAUSE OF THE PRIOR
11 STRIKE FELONY CONVICTION FOUND TO BE TRUE AFTER COURT
12 TRIAL.

13 THE COURT IS ELECTING IN THIS CASE TO IMPOSE THE
14 AGGRAVATED TERM BECAUSE THE COURT FINDS THAT THIS CRIME
15 INVOLVED GREAT VIOLENCE, THREATS OF GREAT BODILY HARM,
16 HIGH DEGREE OF CRUELTY, VICIOUSNESS WITH RESPECT TO THE
17 WAY THAT THE VICTIM WAS TREATED. AND ALSO, OF COURSE, I
18 FIND THAT YOUR CONDUCT INDICATES TO ME THAT YOU POSE A
19 VERY SERIOUS DANGER TO SOCIETY FOR RULE 421(B) (1). SO,
20 THE AGGRAVATED TERM IS IMPOSED AS TO COUNT FOUR.

21 AS TO COUNT THREE, FOR A CONVICTION OF
22 CALIFORNIA PENAL CODE SECTION 245 SUBDIVISION A.
23 SUBDIVISION 1, WHICH IS A SEPARATE VICTIM, THE COURT
24 ORDERS THAT YOU BE COMMITTED TO THE CALIFORNIA DEPARTMENT
25 OF CORRECTIONS FOR THE TERM OF TWO YEARS, WHICH IS
26 ONE-THIRD OF THE MIDTERM. THE MIDTERM, AGAIN, IS DOUBLED
27 BECAUSE OF THE STRIKE PRIOR FELONY CONVICTION. SO,
28 ONE-THIRD OF THE MIDTERM OF SIX YEARS IS TWO YEARS. THAT

Exhibit "C"

19

19 TWO-YEAR TERM IS ORDERED TO BE SERVED CONSECUTIVE.

2 AND THE CONSECUTIVE BASIS, IN THE COURT'S VIEW,
3 AGAIN, IS THAT THIS WAS A VERY VULNERABLE VICTIM. IT WAS
4 A SEPARATE VICTIM. AND SO THE COURT ORDERS THE TWO-YEAR
5 TERM BE SERVED CONSECUTIVE TO COUNT FOUR.

6 COUNT SIX, FOR A CONVICTION OF CALIFORNIA PENAL
7 CODE SECTION 245 SUBDIVISION A. SUBDIVISION 1, THE COURT
8 ORDERS THAT YOU BE IMPRISONED IN STATE PRISON FOR THE TERM
9 OF TWO YEARS. AGAIN, THAT IS A ONE-THIRD OF THE MIDTERM,
10 THE MIDTERM OF SIX YEARS. SO, BECAUSE OF THE STRIKE PRIOR
11 FELONY CONVICTION, ONE-THIRD OF SIX YEARS IS TWO YEARS.
12 THAT TWO-YEAR TERM, IN THE COURT'S VIEW, IS NOT BARRED BY
13 PENAL CODE SECTION 654.

14 *Auled* THE COURT FINDS IT'S A SEPARATE ACT, ALBEIT ON
15 THE SAME VICTIM AS TO COUNT FOUR, BUT IT WAS SEPARATE
16 INSOFAR AS THE FACT THE 220 ASSAULT WITH INTENT TO COMMIT
17 RAPE HAD OCCURRED. AND THIS WAS A COLD, CALCULATED
18 ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY
19 INJURY AFTER THE 220 WAS COMMITTED. IT'S A SEPARATE ACT.
20 AND, FOR THAT REASON, THE COURT ORDERS THAT IT CAN BE
21 SERVED CONSECUTIVE. IT'S NOT BARRED BY PENAL CODE SECTION
22 654.

23 AND THE COURT ORDERS THE CONSECUTIVE TERM TO BE
24 IMPOSED OF TWO YEARS, BECAUSE THE COURT FINDS THAT YOUR
25 PERFORMANCE ON PAROLE HAS BEEN UNSATISFACTORY PURSUANT TO
26 421.5. AND IT, AGAIN, INDICATES TO THE COURT THAT,
27 ALTHOUGH I'VE ALREADY STATED THIS THAT YOU ARE, IN FACT,
28 IN THE COURT'S VIEW, A VERY SERIOUS THREAT AND DANGER TO

Exhibit "D"

20

1 SOCIETY. THE COURT FINDS THAT THE CONSECUTIVE TERM IS
2 BEING IMPOSED BECAUSE OF THE PRIOR PERFORMANCE ON PAROLE
3 WAS UNSATISFACTORY.

4 SO, THE TOTAL TERM SET ON COUNTS FOUR, THREE AND
5 SIX IS 16 YEARS.

6 AS TO THE PRIOR FELONY CONVICTION FOUND TO BE
7 TRUE BY COURT TRIAL PURSUANT TO PENAL CODE SECTION 667(A)
8 AND 1192.7, TO WIT, THE ROBBERY CONVICTION FROM THE COUNTY
9 OF HOUSTON, IN TEXAS, THE COURT ORDERS THAT A FIVE-YEAR
10 TERM BE IMPOSED. THAT FIVE-YEAR TERM MUST BE SERVED
11 CONSECUTIVE TO THE TERMS PREVIOUSLY IMPOSED.

12 THE TOTAL PRISON COMMITMENT IS SET AT 21 YEARS.

13 NOW, WITH RESPECT TO THE DEFENDANT'S MOTION
14 PURSUANT TO ROMERO, WHICH APPARENTLY I OVERLOOKED AND
15 SHOULD HAVE ADDRESSED PRIOR TO THE IMPOSITION OF ACTUAL
16 SENTENCE, THAT IS DENIED.

17 THE DEFENDANT: EXCUSE ME, YOUR HONOR. I TOLD
18 YOU I WOULDN'T GO ON ROMERO AT THIS TIME.

19 THE COURT: BUT IT'S ON THE RECORD. SO I'M
20 GOING TO INDICATE IT'S DENIED. BECAUSE UNDER THE RECENT
21 DECISION, PEOPLE VERSUS WILLIAMS, IT'S CLEAR TO THE COURT
22 THAT TO STRIKE THAT PRIOR STRIKE CERTAINLY WOULD BE
23 OUTSIDE THE SPIRIT OF THE THREE-STRIKE LAW, TAKING INTO
24 ACCOUNT THE PRIOR CRIMINAL BEHAVIOR, THE CHARACTER OF THE
25 DEFENDANT, THE PROSPECTS FOR HIS FUTURE, THE FACTS IN THE
26 PRESENT OFFENSE; THAT TO EXERCISE THE COURT'S DISCRETION
27 IN THIS CASE TO STRIKE THAT PRIOR STRIKE FELONY CONVICTION
28 CERTAINLY WOULD BE OUTSIDE THE SPIRIT OF THE THREE-STRIKE

Exhibit "E"

F I L E D
MAR 01 2007

KIRI TORRE
Chief Executive Officer
Superior Court of CA County of Santa Clara
BY [Signature] DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

In re) No.: 193679
FRANCIS WAYNE DAVIS,)
On Habeas Corpus) ORDER

Mr. DAVIS, (hereinafter Petitioner,) has filed a habeas corpus petition in which he seeks relief based on the United States Supreme Court's holding, in *Cunningham v. California* (2007) 75 U.S.L.W. 4078, that *Blakely v. Washington* (2004) 542 U.S. 296 applies to California's sentencing practices. However Petitioner's case was final prior to June 24, 2004, (the date *Blakely* was decided) and the *Blakely* rule is not retroactive. (See *In re Consiglio* (2005) 128 Cal.App.4th 511, *People v. Amons* (2005) 125 Cal.App.4th 855, 864-865, and *Schardt v. Payne* (2005, 9th Circuit) 414 F.3d 1025.) Accordingly, all requested relief or action is denied.

DATED: March 1, 2007

Linda R. Condron
LINDA R. CONDRON
JUDGE OF THE SUPERIOR COURT



cc: Petitioner
District Attorney
Research (2-26A)
CJIC

Exhibit "F"

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SIXTH Appellate Dist.

FILED

APR 25 2007

MICHAEL J. YEMLY, Clerk

By _____ DEPUTY

In re FRANCIS WAYNE DAVIS,
on Habeas Corpus.

H031355
(Santa Clara County
Super. Ct. No. 193679)

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Premo, Acting P.J., Elia, J., and Duffy, J., participated in this decision.)

Dated

APR 25 2007

PREMO, J.

Acting P.J.

Exhibit "G"

S152625

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re FRANCIS W. DAVIS on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

SEP 19 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

(Sample Proof of Service - To Be Attached to All Documents Submitted to the Court)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Francis W. Davis

v.

Warden Ken Clark

Case Number: _____

**PROOF OF SERVICE
BY MAIL**

I hereby certify that on 08-12-08, I served a copy
of the attached Writ of Habeas Corpus,
by placing a copy in a postage paid envelope addressed to the person(s) hereinafter listed, by
depositing said envelope in the United States Mail at CSATP State Prison, P.O. Box 6242
CORCORAN, CA. 93212-5242

**(List Name and Address of Each
Defendant or Attorney Served)**

I declare under penalty of perjury that the foregoing is true and correct.

Francis W. Davis

(Name of Person Completing Service)

20

Francis W.
C 5 A T F State Prison
P.O. Box 5242 / D-2 - 104
Corcoran, Ca. 93212-5242

BAKE

AUG 12 2008
P.M.



To: Office of the Clerk, U.S. District Court
Northern District of California
280 South First Street, Room 200
San Jose, Ca. 95113-3095



8-12-08 CCI L. DELA TORRE

LEGAL MATERIALS ONLY

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